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No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held, in conformity with this Court's reasoning in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), and an "avalanche" of decisions from both federal and state reviewing courts, that the Locomotive Inspection Act, 49 U.S.C. § 20701, et seq., preempts Petitioners' state tort claims involving the design, construction, and safety of railroad equipment?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The plaintiffs are Gloria Gail Kurns, the executrix of the estate of the late George M. Corson, and Frieda E. Jung Corson, the widow of George M. Corson.

The defendants are Railroad Friction Products Corporation ("RFPC") and Viad Corp ("Viad"). All other named defendants were dismissed from the action prior to the decision below.

RFPC is wholly owned by RFPC Holding Corporation, which is wholly owned by Westinghouse Air Brake Technologies, d.b.a. Wabtec Corporation. There is no parent or publicly held corporation owning 10% or more of Westinghouse Air Brake Technologies.

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BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

1. For more than a hundred years, the federal government has regulated almost every aspect of the railroad industry, including railroad equipment, safety, labor relations, and working conditions. *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982).

In particular, for the safety of railroad employees, this federal regulation has extended to all aspects of the design, construction, material, and maintenance

of locomotives and railcars. Thus, in 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), currently codified at 49 U.S.C. § 20301, et seq. Later, in 1911, Congress enacted the Boiler Inspection Act ("BIA"), now known as the Locomotive Inspection Act ("LIA") and currently codified at 49 U.S.C. § 20701, et seq.[1]

Additionally, early in the twentieth century, Congress passed the first Federal Employers' Liability Act ("FELA"), now codified at 45 U.S.C. § 51, et seq., giving railroad employees injured on the job federal remedies against their employers. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994).

The SAA and LIA were enacted with the same Congressional purpose—to protect railroad workers by ensuring that railroad equipment is not unreasonably dangerous—and they are read in *pari materia* with one another and with FELA, which provides for the enforcement of the SAA and LIA and the redress of work-related injuries. *Urie v. Thompson*, 337 U.S. 163, 190 (1949).

Through all of these acts, Congress has created a comprehensive system for the federal regulation of the design, construction, and safety of railroad equipment, including parts and appurtenances, used in interstate commerce, and it has conferred on the

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[1] The LIA originally was known as the Boiler Inspection Act, or BIA, and is referred to as such in much of the case law cited and quoted in the Court of Appeals' opinion and in this response. References to the LIA or BIA refer to the same statute, 49 U.S.C. § 20701, et seq.

Interstate Commerce Commission (and now the Secretary of the Department of Transportation and his delegate, the Federal Railroad Administration ("FRA")) virtually exclusive authority over railroad safety. *See Southern Ry. Co. v. Railroad Comm'n of Indiana*, 236 U.S. 439, 444-48 (1915) (preemptive effect of the SAA); *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926) (preemptive effect of the BIA); *Urie v. Thompson*, 337 U.S. at 182, 188-89 (SAA and BIA work together to regulate safety).

The SAA and LIA and their accompanying federal regulations were supplemented in 1970 by the Federal Railroad Safety Act ("FRSA"), now codified at 49 U.S.C. § 20101, et seq. The FRSA gives broad powers to the Secretary of Transportation to prescribe regulations and issue orders "for every area of railroad safety supplementing [the SSA and LIA and accompanying regulations]." 49 U.S.C. § 20103(a).

2. This pervasive federal regulatory scheme carries legal consequences for actions brought under state law as well. In *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. at 613, this Court first addressed the LIA's preemptive effect on state law. It specifically held that "the power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. This Court went on to "hold that state legislation is precluded, because *the Boiler Inspection Act, as we construe it,*

was intended to occupy the field." *Id.* at 613 (emphasis added).

Consistent with the reasoning in *Napier*, the LIA occupies the regulatory field relating to railroad equipment used in interstate commerce and preempts state laws insofar as they would regulate the design, construction, and safety of such equipment.

3. On June 13, 2007, George M. Corson and Frieda E. Jung Corson brought this products liability action against RFPC, Viad, and others in the Philadelphia County Court of Common Pleas for compensatory and punitive damages for the harmful effects to Mr. Corson's health resulting from his alleged exposure to asbestos when installing brake shoes and engine valves on locomotives and railcars. App. 2a-4a, 23a-24a.[2]

Several of the joined defendants moved for summary judgment on various grounds. The state court granted these motions with regard to all of the

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[2] Viad allegedly is the successor in interest of a company that manufactured the locomotives and boilers and RFPC allegedly is a distributor of brake shoes—i.e., "parts and appurtenances" that are used interchangeably on locomotives and railcars.

Mr. Corson died on November 17, 2007. Gloria Gale Kurns, the daughter of Mr. Corson and executrix of his estate, subsequently was substituted as a plaintiff. App. 3a, 23a. Contrary to the Petition at 11 n.1, RFPC has not conceded that there was any causal connection between any brake shoe product that it distributed and any injury to Mr. Corson

defendants except RFPC and Viad. App. 3-4a, 23a-24a.

4. The state court's summary judgment order dismissed the single Pennsylvania defendant whose presence had precluded removal under 28 U.S.C. § 1332. RFPC and Viad subsequently removed the case to federal district court. App. 5a, 23a-24a.

5. Once in federal court, RFPC and Viad moved for summary judgment based on the LIA's preemptive effect. App. 4a-5a, 23a-24a. On February 5, 2009, the district court granted those motions, holding that the LIA preempted Petitioners' state law product liability claims. App. 4a-5a, 23a-24a. Petitioners appealed, and, on September 9, 2010, the Third Circuit Court of Appeals affirmed. App. 1a-21a.

6. Petitioners then sought rehearing and rehearing en banc, and their petition was denied. A timely petition for a writ of certiorari followed. App. 42a-43a.

REASONS FOR DENYING THE WRIT

The *Kurns* petition should be denied because the Court of Appeals' decision does not implicate any irreconcilable conflict of authority among the federal circuit courts of appeals or state courts of last resort. Rather, that decision is consistent with this Court's precedents and an "avalanche" of decisions in federal and state courts establishing the LIA's preemptive effect on state law claims relating to the design, construction, and safety of railroad equipment, including parts and appurtenances used on locomotives and railcars. In addition, that decision does not raise any concerns, real or imagined, about the LIA's preemptive reach.

I. There Is No Irreconcilable Conflict Among The Federal Courts Of Appeals Or The State Courts Of Last Resort Regarding The Question Presented.

This is one of three cases presently pending in this Court that raise the same question about whether the LIA preempts state common law and statutory tort claims by workers allegedly injured by exposure to asbestos contained in equipment, parts, and appurtenances used on locomotives and railcars. The other petitions are *Atwell v. John Crane, Inc.*, No. 10-272 (petition filed Aug. 23, 2010), and *Griffin Wheel, Inc. v. Harris*, No. 10-520 (petition filed Oct. 12, 2010).[3] The question presented in these petitions does not merit further review by this Court because there is no irreconcilable conflict among the federal courts of appeals or the state courts of last resort on the LIA's preemptive reach.

In *Napier*, 272 U.S. at 611-13, this Court addressed the scope of LIA preemption and held that the LIA occupies a broad field of regulation relating to the design, construction, selection, installation, and maintenance of "every part of the locomotive and tender and of all appurtenances" and preempts state laws insofar as they seek to regulate the same subject matter for the safety and welfare of railroad workers.

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[3] The Court has called for the Acting Solicitor General's views in *Atwell*, *see* 131 S.Ct. 552 (2010) The Court has not acted on the petition in *Harris*, which was distributed for the Conference of December 10, 2010.

This Court repeatedly has reaffirmed the reasoning and holding of *Napier*, most recently by implication via a 1983 memorandum decision affirming the judgment in *Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n. See U. S. v. Baltimore & O. R. Co.*, 293 U.S. 454, 459 (1935) (under the LIA, the federal regulator "clearly" has authority to regulate "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances").[4]

Moreover, in the 80 years since *Napier*, it has been settled that the LIA occupies the field of regulation relating to, and preempts state law claims arising from, the design, construction, and safety of all railroad equipment, including materials, parts, and appurtenances. No federal court of appeals or state court of last resort ever has held to the

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[4] *See also Southern Ry Co. v Lunsford*, 297 U S 398, 402 (1936) (holding that the BIA encompasses "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the [Secretary]"); *California v Taylor*, 353 U.S. 553, 560 n 8 (1957) (citing *Napier* and other cases "upholding the supremacy of federal statutes relating to railroads in interstate commerce"), *Bethlehem Steel Co. v New York State Labor Relations Bd* , 330 U.S. 767, 772 (1947) (citing *Napier* and other cases recognizing implied field preemption based on the existence of a comprehensive federal regulatory scheme that leaves no room for the states to supplement it), *Guss v Utah Labor Relations Bd.*, 353 U S 1, 10 (1957) (same), *Ray v Atl Richfield Co.*, 435 U S. 151, 157 (1978) (same); *Consol. Rail Corp. v Pa Pub. Util. Comm'n*, 536 F. Supp. 653 (E D Pa 1982) (applying *Napier* and holding that LIA preempted state law requiring locomotives to have speed records and indicators), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983).

contrary, with the singular exception of the Pennsylvania Supreme Court. *See Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). In *Norfolk & Western*, the Pennsylvania Supreme Court held that the passage of the FRSA in 1970 implicitly altered LIA field preemption and re-opened the field to state regulation.

Norfolk & Western's construction of the FRSA and the LIA is irreconcilable with the plain language and express purposes of the two statutes and has been rejected by every other federal court and state court of last resort that has addressed the LIA's preemptive effect.

Most importantly for purposes of the three pending petitions, however, *Norfolk & Western* was impliedly overruled by this Court only three years after it was issued. *See Consol. Rail Corp.*, 536 F. Supp. at 653, *aff'd mem.*, 696 F.2d at 981, *aff'd mem.*, 461 U.S. at 912. In *Consolidated Rail Corp.*, a plaintiff railroad challenged a Pennsylvania statute that required locomotives to have speed recorders and indicators, contending the BIA preempted this state regulation. Relying on *Norfolk & Western*, the Commonwealth argued that the enactment of the FRSA in 1970 redistributed railroad regulatory authority and implicitly abrogated *Napier*'s LIA field preemption holding. *Id.* The district court expressly rejected *Norfolk & Western*'s reasoning and holding and held that *Napier* was controlling. *Id.* Both the Court of Appeals and this Court affirmed summarily. The Court has made it clear that a summary affirmance must "be understood as ... applying principles established by prior decisions to the particular facts involved," and as "prevent[ing] lower

courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Concomitantly, this Court's summary affirmance in *Consolidated Rail* must be understood as applying the principles established in *Napier* and its progeny to the particular facts of *Consolidated Rail* to prevent lower courts from concluding, as the *Norfolk & Western* court did, that the FRSA's enactment abrogated *Napier*'s preemption analysis and holding.

Indeed, since *Consolidated Rail Corp.*, courts have heeded its directive. No federal court of appeals or state court of last resort has ever called LIA's preemptive reach into question. On the contrary, a solid phalanx of federal and state court decisions have applied *Napier* and its progeny and held that the LIA preempts state common law and statutory claims against manufacturers and distributors of locomotive and railcar equipment, parts, and appurtenances. This body of case law includes at least eight decisions by six federal courts of appeals (including the decision below),[5] six decisions by five

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[5] *See Forrester v. American Dieselelectric, Inc.*, 255 F 3d 1205 (9th Cir 2001) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *Law v Gen. Motors Corp.*, 114 F 3d 908 (9th Cir. 1997) (BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise), *First Security Bank v Union Pacific R R. Co.*, 152 F.3d 877 (8th Cir. 1998) (BIA preempts state common law remedies against railroad manufacturers for injuries arising out of alleged design defects), *Springston v. Consol. Rail Corp* , 130 F 3d 241 (6th Cir 1997) (BIA preempts claim based on inadequacy of warning

state courts of last resort,[6] and numerous decisions by federal district courts, state intermediate appellate courts, and state trial courts.[7]

(continued)

devices), *Oglesby v. Delaware & Hudson Ry. Co* , 180 F.3d 458 (2d Cir. 1999) (BIA preempts claim that manufacturer should have placed warning label on defective seat), *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Mo Pac. R R. Co. v. R.R. Comm'n of Tex.*, 833 F 2d 570 (5th Cir 1987) (BIA preempts state requirement for emergency equipment).

[6] *See Darby v. A-Best Prods Co.*, 811 N.E 2d 1117 (Ohio 2004) (BIA preempts state tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives); *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (W. Va 2003) (BIA preempts any state action that would affect the design, the construction, and the material of locomotives), *Gen Motors Corp v. Kilgore*, 853 So.2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Scheuding v Gen. Motors Corp* , 993 P.2d 996 (Cal. 2000) (BIA preempts state defective design and failure-to-warn claims against manufacturer); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont 2000) (BIA preempts common law claims against railroad concerning locomotive equipment), *Norfolk S Ry Co. v. Denson*, 774 So.2d 549 (Ala. 2000) (BIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning).

[7] *See Stevenson v. Union Pac. R.R Co.*, No 4 07CV00522BSM, 2009 WL 2702774 (E D. Ark Jan. 20, 2009) (holding that the BIA preempts a contribution and indemnification claim because the underlying claim was preempted by the BIA), *D'Amico v Garlock Sealing Techs , LLC*, No. 92-5544, 2007 WL 2702774, at *7 (E.D Pa. Sept. 13, 2007)

In particular, the Court of Appeals here, and four state courts of last resort, have held expressly that the LIA *does* preempt state common law and statutory tort claims by railroad employees allegedly injured by exposure to asbestos contained in equipment, parts, and appurtenances used on locomotives and railcars. App. 6a-21a; *see Darby*, 811

(continued)

("Forcing railroad manufacturers to conform to state design and construction standards would naturally impinge on the field of locomotive equipment that Congress occupied through the BIA"), *Roth v. I & M Rail Link LLC*, 179 F. Supp 2d 1054 (S.D. Iowa 2001) (BIA preempts state law negligence claims against the manufacturer of a locomotive); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. On Sept. 22, 1993*, 188 F Supp. 2d 1341 (S.D. Ala. 1999) (BIA preempts passenger and employee common law negligence and design defect claims against Amtrak), *Wright v Gen. Electric Co.*, 242 S W 3d 674 (Ky. Ct App. 2007) (BIA bars state common law tort claims against carriers, locomotive manufacturers, and locomotive component part manufacturers); *Frastaci v Vapor Corp.*, 70 Cal. Rptr 3d 402 (Cal. Ct App. 2007) (BIA forecloses state tort claims against locomotive manufacturers for defective design of their product), *Caradonna v. A W Chesterton Co., Inc.*, No 0106785/2006, 2007 N Y Misc LEXIS 8994 (N Y. Slip Op. April 25, 2007) (finding claims of railroad worker, against various manufacturers of locomotives and their components and parts, preempted under the BIA), *Seaman v. A.P. Green Indus. Inc.*, 707 N Y S 2d 299 (N Y. Sup Ct 2000) (finding federal field preemption under the BIA and accordingly dismissing all claims against locomotive manufacturer), *In re Train Collision at Gary, Ind.*, 670 N E 2d 902 (Ind. App. Ct. 1996) (BIA preempts claims regarding alleged defects in the design and structure of train cars), *Key v. Norfolk S. Ry. Co.*, 491 S E 2d 511 (Ga. App. Ct. 1997) (BIA preempts common law claims against railroad by employee injured in fall from locomotive steps).

N.E.2d 1117; *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (noting the "avalanche" of authority in favor of LIA field preemption); *Gen. Motors Corp.*, 853 So.2d 171; *Scheiding*, 993 P.2d 996.[8]

There are only two decisions, by a single state's intermediate appellate court, contrary to this "avalanche" of uniformity. *See Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009), *appeal denied*, 996 A.2d 490 (Pa. 2010), *petition for cert. pending*, No. 10-272; *Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010) (TABLE), *appeal denied*, 3 A.3d 671 (Pa. 2010), *petition for cert. pending sub nom. Griffin Wheel, Inc. v. Harris*, No. 10-520. These decisions, however, do not create a compelling reason or need for this Court to grant review, invest its scarce resources, and add its voice to the chorus.

As an initial matter, this Court rarely grants review based on conflicts involving state intermediate appellate courts. In addition, the decision below is a definitive declaration of the preemptive principles that will control federal courts in Pennsylvania and likely will be influential in any subsequent analysis of the preemption issue undertaken by Pennsylvania's state courts. If Pennsylvania courts follow the Court of Appeals'

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[8] Other decisions are in accord, uniformly applying the LIA to preempt state common law and statutory claims in these circumstances. *See D'Amico*, 2007 WL 2702774, at *7; *Wright*, 242 S.W.3d at 674; *Frastaci*, 70 Cal. Rptr. 3d at 402; *Caradonna*, 2007 N.Y. Misc. LEXIS 8994, at *1; *Seaman v. A.P. Green Indus.*, 707 N.Y.S.2d at 299.

decision in this case and embrace the controlling rule, then any nascent conflict will be resolved. Moreover, even if the Pennsylvania courts continue to follow the intermediate appellate decisions in *Atwell* and *Harris*, the Pennsylvania Supreme Court can take up the issue with the added benefit of the Court of Appeals' decision below, as well as this Court's controlling decision in *Consolidated Rail Corp.* If the Pennsylvania Supreme Court splits from the unbroken line of cases cited previously, this Court could then intervene based on a genuine conflict among the federal courts of appeals and the state courts of last resort.

II. The Court Of Appeals' Decision Follows And Faithfully Applies The Controlling Law Dealing With The LIA's Preemptive Effect.

The petition also should be denied because the Court of Appeals' decision here is correct and further reinforces the controlling law regarding the LIA's intended preemptive effect. There is, in short, nothing in this case that needs to be fixed.

In *Napier*, 272 U.S. at 611-13, this Court considered a preemption challenge to a Georgia law that required all trains operating in the state to have an automatic fire door and a cab curtain. The Court found that, through the LIA, Congress conferred on the Interstate Commerce Commission the "general" power to regulate the safety of railroad equipment, that the Commission's power extended "to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances," and that the "broad scope" of the LIA's delegation of power to the Commission led to the conclusion that the LIA was intended to occupy the entire field of

regulation and preempt all state laws falling within the scope of the Commission's authority. *Id.*

The Court also specifically noted that the delegation of powers to the federal agency meant that any state law in that area was preempted, regardless of whether the agency actually exercised those powers. *Id.*

The broad scope of the LIA's delegation of regulatory authority to the Interstate Commerce Commission (and now to the Secretary of Transportation, and his delegate, the FRA) and the statute's preemptive effect on state laws and state law claims relating to the design, construction, and material of railroad equipment, parts and appurtenances flows directly from the need to maintain uniformity of railroad operating standards across state lines. As the FRA has pointed out,

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion....
>
> ...
>
> [P]iecemeal regulation of individual hazards ... by any other agency of government would be disruptive and contrary to the public interest.

Dep't of Transp., FRA, *Railroad Occupational Safety and Health Standards; Termination*, 43 Fed. Reg. 10583, 10585-86 (March 14, 1978).

And, as the Ninth Circuit further highlighted in *Law*, "[t]he virtue of uniform national regulation 'is self-evident: locomotive companies need only concern

themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" 114 F.3d at 910 (quoting *Southern Pac. Transp. Co. v. Oregon PUC*, 9 F.3d 807, 811 (9th Cir. 1993)); *see also R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993) ("Th[e] lasting history of pervasive and uniquely-tailored congressional action indicates Congress' general intent that railroads should be regulated primarily on a national level through an integrated network of federal law."). Accordingly, "[a]ny state law that undermines this regime is preempted ...." *Law*, 114 F.3d at 910.

State law statutes or claims attempting to regulate allegedly defective or dangerous railroad equipment thus must be preempted to preserve the uniform and exclusive federal scheme Congress established. As one court explained it:

> "A railroad equipment manufacturer found to have negligently designed a braking system ... is expected to modify that system to reduce the risk of injury. If the manufacturer fails to mend its ways, its negligence may be adjudged willful in the next case, prompting a substantial punitive damages award. If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined."

Gen. Motors Corp., 853 So.2d at 175-76 (quoting *Law*, 114 F.3d at 910-12 (citations and footnote omitted)); *see also Scheiding v. Gen. Motors Corp.*, 993 P.2d at 1003 (same).

Here, the avowed Congressional goal to provide for exclusive and uniform federal regulation regarding the design, construction, and safety of all railroad equipment, including parts and appurtenances, would be undermined if state law tort claims like those urged by Petitioners were allowed. Such claims, in purpose and effect, would intrude on the regulatory field occupied exclusively by the LIA. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (recognizing that state law remedial actions can be, and are designed to be, a form of state regulation incompatible with a comprehensive federal regulatory and remedial scheme); *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 286-87 (1986) (under *Garmon*, where there is a "complex and interrelated federal scheme of law, remedy, and administration," field preemption principles bar a state from adding to the remedies provided by the integrated federal regulatory scheme).

The Court of Appeals' decision in this case explicates and embraces the rationales underlying this overarching preemptive principle and faithfully applies them to Petitioners' state law tort claims. App. 6a-21a. As the Court of Appeals firmly and definitively concludes:

> The goal of the LIA is to prevent the paralyzing effect on railroads from prescription by each state of the safety

> devices obligatory on locomotives that would pass through many of them. ... In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the LIA governs both the design and the construction of a locomotive's parts. ...
>
> If each state had its own standards for liability for railroad manufacturers, equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states.

App. 12a-14a (internal quotations and citations omitted).

On review of the relevant federal statutory scheme, the relevant preemption principles, and the relevant authorities, therefore, it is apparent that the Court of Appeals' decision is on solid footing and reaches the correct result. Its analysis is comprehensive, on point, and leaves nothing further to add. An opinion of that kind does not need or require further review by this Court.

III. This Case Does Not Raise Any Issue About The LIA's Preemptive Effect That Requires Further Attention From This Court.

Despite the uniformity of the case law, Petitioners maintain that the LIA's preemptive effect somehow is in doubt based on decisions rendered by this Court after *Napier*, by subsequent legislative actions, by the limitations on private actions under FELA, and

by regulatory action by the FRA mandating compliance with certain Occupational Safety and Health Administration regulations. None of these contentions has merit and none provides a reason to grant review in this case.

A. No Decision Of This Court Post-*Napier* Casts Any Doubt On The LIA's Preemptive Effect In This Case.

Petitioners claim that the Court of Appeals' decision is contrary to a series of decisions by this Court. Pet. 15-21 (citing *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589 (1934); *Tipton v. Atchison, T.&S.F.R. Co.*, 298 U.S. 141 (1936); *Atchison, T.&S.F.R.Co. v. Scarlett*, 300 U.S. 471 (1937); *Breisch v. Central R. of N.J.*, 312 U.S. 484 (1941); *Shields v. Atlantic C.L.R. Co.*, 350 U.S. 318 (1956)).[9] None of the cited decisions addresses the preemptive scope of the LIA as established in *Napier* or casts doubt on the LIA's preemptive effect on state tort claims concerning the design, construction, and safety of

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[9] Although these authorities take stage-center in the petition, none was identified by Petitioners, either in their appellate merits briefing or their petition for rehearing, as being relevant to the analysis of the LIA's preemptive reach. App. 1a-21a, 42a-43a. Petitioners therefore are asking this Court to grant certiorari based on an argument about a purported conflict not covered in the briefing below or vetted by the Court of Appeals. Nor is the purported conflict yet exposed in any lower court decisions, much less dispositive decisions from any federal circuit court of appeals or state courts of last resort. Simply put, this is not the sort of conflict or record that provides an adequate basis for this Court to grant review

federally regulated railroad equipment. Indeed, the cases do not deal with LIA preemption at all.

The earliest of the cases cited in the petition, *Meredith*, 292 U.S. at 589, concerned whether "travelers at railway-highway crossings" have standing to sue a railroad for injuries caused by a failure of the railroad to comply with the SAA. The case had nothing to do with the LIA or its preemptive effect on state law and did not discuss the Court's reasoning or holding in *Napier*.

The same goes for *Tipton*, 298 U.S. at 141. That case concerned the pleading of claims for alleged violations of the SAA in intrastate commerce; the resolution of that question did not involve *Napier* or the LIA or its preemptive reach. *See also Breisch*, 312 U.S. at 484 (same).

Scarlett, 300 U.S. at 471, and *Shields*, 350 U.S. at 318, also are inapposite. *Scarlett* and *Shields* concerned whether brace rods and dome running boards (respectively) were safety devices covered by the SAA. *See Scarlett*, 300 U.S. at 475; *Shields*, 350 U.S. at 318. The Court's analysis in each case was limited to the statutes and regulations relevant to the particular questions presented and did not implicate the preemptive reach of the LIA under *Napier*.[10]

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[10] Contrary to the petition (at 36-40), *Wyeth v. Levine*, --- U.S. ----, 129 S.Ct. 1187, 1192 (2009), also does not cast doubt on *Napier*'s preemption analysis. *Wyeth* involved principles of conflict preemption, the doctrine of field preemption was not before the Court. *Id.*

On reasoned analysis, Petitioners' attempt to use these unrelated cases to cast doubt on *Napier*'s reasoning and holding collapses. There is no need for this Court to grant review to dispel the non-existent "conflict" that Petitioners have invented and now advance.

B. No Legislative Action Or Other Development Post-*Napier* Casts Any Doubt On The LIA's Preemptive Effect In This Case.

Petitioners also claim that the Court of Appeals' preemption analysis fails to account for subsequent legislative developments, limitations on private actions under FELA, and regulatory actions by the FRA mandating compliance with certain Occupational Safety and Health Administration regulations. But these arguments have been rejected repeatedly by courts that have confronted them. App. 9a-10a n.5, 16a-21a; *see, e.g., Darby*, 811 N.E.2d at 1125-26; *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 823-24; *Gen. Motors Corp.*, 853 So.2d at 176-80; *Scheiding*, 993 P.2d at 999-1004. There is no perceptible reason for this Court to grant review to weigh in on these settled issues.

To begin with, the Court of Appeals properly rejected Petitioners' arguments that the FRSA altered and withdrew LIA field preemption. Pet. 26-33; App. 18a-21a. Any question about the FRSA's impact on LIA field preemption likewise would appear to be answered definitively by this Court's summary affirmance of *Consolidated Rail Corp.* *See supra* pp. 7-11. Contrary to the petition, nothing in the FRSA repeals the LIA or purports to withdraw the federal regulator's power over the entire field

relating to the design, construction, and safety of railroad equipment and parts. In reality, the statute expressly authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety ..." and provides that "[l]aws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practicable." 49 U.S.C. §§ 20103(a), 20106(a).[11]

Furthermore, the Court of Appeals also properly rejected Petitioners' argument that the LIA has no preemptive effect on state law claims related to incidents that occur when a train is not "in use." Pet. 25; App. 9a-10a n.5. Here, Petitioners' argument conflates LIA field preemption with FELA's standard for absolute liability for railroad employers. Under FELA, the absolute liability of railroads for the injuries of their employees depends on whether locomotives and rail cars are "in use" at the time of the accident. *See, e.g., Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995). However, this rule

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[11] The 2007 FRSA amendment touted in the petition also is irrelevant to any field preemption analysis in this case. The stated purpose of the 2007 amendment was to nullify the effect of two federal court decisions—*Mehl v. Canadian Pac. Ry., Ltd.*, 417 F. Supp. 2d 1104 (D.N.D. 2006), and *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006)—that (1) arose out of a January 18, 2002 Minot, North Dakota train derailment and (2) concern not LIA field preemption, but only an express preemption provision of the FRSA. App. 34a (district court decision collecting authorities). In addition, the 2007 amendment applies only to events occurring on or after January 18, 2002 (the date of the Minot derailment). Here, Petitioners' claims arose from exposure that allegedly began and ended years before the 2007 amendment's effective date.

has nothing to do with the scope of LIA preemption. The field of regulation occupied by the LIA encompasses all aspects of the design, construction, and safety of railroad equipment, parts, and appurtenances—characteristics that remain the same regardless of whether a train is "in use" or "off-line." *See Napier*, 272 U.S. at 611-13; *Lunsford*, 297 U.S. at 402; *see also D'Amico*, 2007 WL 2702774, at *7 (rejecting Petitioners' argument); *Frastaci*, 70 Cal. Rptr. 3d at 403-04, 408-10 (same); *Seaman*, 707 N.Y.S.2d at 302 (same).

Finally, the Court of Appeals likewise got it right in dismissing Petitioners' arguments that the FRA had narrowed the scope of LIA field preemption by ceding regulatory control over locomotives and railcars in repair shops to the Occupational Safety and Health Administration. Pet. 33-36; App. 16a-17a. As the court explained in rejecting Petitioners' assertion, such claims emanate, not from the working conditions of repair shops, but from the "material used to construct railroad equipment, parts, and appurtenances"—areas regulated exclusively by the FRA under the LIA. App. 16a-17a.

In this case, the Court of Appeals' analysis puts all legislative, regulatory, and remedial developments since *Napier* in their proper perspective and shows why they do not impact the analysis of the LIA's intended preemptive reach. No conceivable concerns requiring this Court's attention are raised in any part of that analysis. Petitioners' claims to the contrary lack merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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